IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 17TH OCTOBER 2007 / 25TH ASWINA 1929

Death Sentence Ref..No. 1 of 2007()

SC.998/2004 of ADDL. DISTRICT & SESSIONS COURT (ADHOC) I, KOLLAM
CP.88/2002 of JUDICIAL FIRST CLASS MAGISTRATE-II, KOLLAM
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COMPLAINANT:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

RESPONDENTS/ACCUSED:
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1. RAJU, S/O.SANKARA PILLAI,
CHIRAPPURATHU THEKKETHIL,
KAPPIL KIZHAKKU MURI,
KRISHNAPURAM, KARTHIKAPPALLY,
ALAPPUZHA.

2. BINITHA KUMARI, W/O.VIDHUKUMARAN THAMPI,
LAKSHMI BHAVANAM, SIVADANATHU THEKKETHIL,
EDAKKULANGARA, KALLELIBHAGAM,
KARUNAGAPPALLY FROM JYOTHI BHAVAN,
VALLAKKADAVU, PETTA, THIRUVANANTHAPURAM.

R1 BY ADV.SRI.G.BHAGAVAT SINGH
SMT.MINI GANGADHARAN
R2 BY ADV.SRI.K.RAMAKUMAR

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 17/10/2007, ALONG WITH CRA NO. 1119 OF 2006 & CRA NO. 1062 OF 2006 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY and K.HEMA, JJ.

D.S.R.No.1 OF 2007 and
Crl.A.Nos.1062 and 1119 of 2006

Dated 17th October, 2007

JUDGMENT

Koshy,J.

A 33 year old young man was alleged to be murdered by his wife (A2) and her paramour (A1) by administering Gardinal Phenobarbitone tablets and after death his body was packed in a plastic mat using plastic rope and coir, enclosed the same in a bed holder and it was thrown into a valley at the 6th hairpin curve in the Ootty-Mettupalayam road. Brother of the deceased (PW1) filed a complaint on 21.4.2000 for man missing from 15.4.2000. Thereafter, in the course of investigation, on the basis of the disclosure made by the first accused, the body was found out on 23.4.2000 (after about five days of the death). After considering the evidence, the Sessions Court found that the offence alleged against the accused under Sections 120B, 201, 364 and 302 read with Section 34 of the Indian Penal Code were proved. The trial Judge came to the conclusion that the accused murdered the deceased in a most cruel manner and it is one of the rarest of rare cases and, hence, capital punishment was imposed for the offence punishable under Section 302 of the Indian Penal Code subject to confirmation of the same by this court. Apart from the Death Sentence Reference, accused 1 and

2 filed two separate appeals as Crl.A.Nos.1062 and 119 of 2006 respectively.

2. The prosecution case as revealed from the charge-sheet is that the deceased Vidhukumaran Thampi was the husband of the 2nd accused Binithakumari who was in illegal intimacy with the 1st accused Raju, a nursing assistant in the Military Hospital at Pangode in Thiruvananthapuram. The accused 1 and 2 have desired and determined to annihilate Vidhukumaran Thampi, who stood as a hurdle in their immoral relationship. On 12.10.1999, the accused misrepresenting them as husband and wife, took the house building of CW15(PW8) Usha in Kumarapuram of Thiruvananthapuram and resided there along with CW6(PW9) Lakshmi, the five year old daughter of Vidhukumaran Thampi in the 2nd accused. On 16.1.2000, the deceased Vidhukumaran Thampi took a house on rent from PW2 in Mundakkal East Ward of Kollam and he along with the 2nd accused and their daughter started living there. According to the prosecution, the accused have met at several places and conspired to kill Vidhukumaran Thampi by administering Gardinal Phenobarbitone, an alloppathic tablet, in over-dose. On 2.4.2000, the 1st accused purchased Phenobarbitone tablets from Mohanan (PW 33), grinded the same into powder and entrusted the powder in a paper pack to the

2nd accused, who brought it to the rented house of PW2 at Mundakkal to administer it to her husband. By about 8 p.m. on 15.4.2000, the 2nd accused made Vidhukumaran Thampi to consume Phenobarbitone powder in over-dose telling him that it is a medicine for esnophilia . Since the deceased did not die and remained in a semi-conscious stage, the 2nd accused invited the 1st accused to their house to kill the former. Accused 1 and 2 again administered the deceased with the poisonous tablet powder at 9.30 p.m. and as they could not get the expected death of the deceased, the 1st accused tried to kill him by strangulation holding around his neck. When the deceased cried aloud exclamating he may be killed, the 2nd accused tried to close his mouth using her right hand. The deceased bit and injured the middle finger of the right hand of the 2nd accused and when neighbours were collected outside the house, the accused took him to the house at Kumarapuram in the car of CW5 at about 12.45 p.m. Thereafter nobody has seen the deceased alive. On 16.4.2000, the deceased was given Phenobarbitone poison repeatedly in different food items. It is also alleged that on 17.4.2000 the first accused purchased Furidon from CW40 (PW52), dissolved the same in water and injected it into the body of the deceased using the syringe and needle purchased from CW38(PW33). The deceased died on 18.4.2000. The accused 1 and 2 packed the naked dead body of Vidhukumaran Thampi in a

plastic mat using plastic rope and coir and enclosed the same in a bed-holder, carried it in the dickey of the taxi car bearing registration No.KL-4A-6595 driven by PW3 and threw the dead body into a valley at the 6th hair-pin curve in the Ootty-Mettupalayam road at about 1.30 a.m. on 19.4.2000. Hence, they have committed the offences punishable under Sections 120B, 201, 364 and 302 read with Section 34 of the Indian Penal Code.

3. Counsel for the first appellant at the outset submitted that despite the cruel nature of the crime, the court should not be biased by emotional consideration and appreciation of evidence should be in a dispassionate judicial consideration and in a cool detached manner. We agree with the above submission as it is settled law as held by the Supreme Court in **Balwinder Singh** v. **State of Punjab** (AIR 1996 SC 607) and **Mundrika Mahto and others** v. **State of Bihar** (2002 AIR SCW 2093). It was pointed out that there were many defects in the charges framed by the court and also in the investigation. We are of the view that criminal justice is concerned with finding of the truth by considering the admissible evidence adduced in the court. Our effort is not to find out the defects in the investigation with a microscope or to decide the case on hyper- technicalities. Apex Court in **State of Karnataka** v.

K.Yarappa Reddy (AIR 2000 SC 185) held that criminal justice should not be made the casualty of the wrongs done by the Investigating Officers. It has been consistently held by the Supreme Court that on the basis of admissible evidence if the court comes to the conclusion that prosecution was not able to prove the case, the accused has to be acquitted. It is the duty of the prosecution to prove the case, either by direct evidence or by circumstantial evidence, beyond reasonable doubt and benefit of reasonable doubt should be given to the accused as no innocent person can be punished. At the same time, it is the duty of the court to see that if there are enough materials to show that the accused is guilty, he should not go un-punished as it will result in failure of justice. Irregularity or illegality in investigation is of no consequence when there is clear evidence otherwise as held by the Apex Court in **Bikau Pandey and others** v. **State of Bihar** (AIR 2004 SC 997) and **State of Rajasthan** v. **Kishore** (AIR 1996 SC 3035). Even if the reasoning of the trial court in certain points are not acceptable, the appellate court has got all the powers of the trial court and our endeavor in this case is to go through the evidence, take the admissible part only and find out the grain leaving the chaff and also to consider whether there are admissible evidence to justify the conviction entered by the trial court. Therefore, instead of searching out the investigation defects, we are

considering the only question whether on the basis of legally admissible evidence, there are materials to come to the conclusion that the accused are guilty beyond reasonable doubt or not.

4. PW1, brother of the deceased gave first information statement. He is a Head Constable of Police by profession and he was working in the Crime Branch during the relevant time. He deposed before the court that the 2nd accused is the wife of the deceased and 1st accused is her paramour. He stated that on 21.4.2000 when he was on duty in Poojappura Police Station, PW2 telephoned and stated that PW1's brother and wife had some talk and brother is not seen and he should come immediately. When he went there, he learnt that the discorded talk (കശപിശ സംസാരം) was on 15.4.2000 and thereafter his brother was missing. Hence, Ext.P1 F.I. Statement was given. He also stated that the deceased, his wife and their daughter were staying at Mundakkal, Kollam. Earlier his brother was staying near Pangode Military Camp. He married the 2nd accused without the consent of the relatives. Thereafter, they were staying in the rented house at Pangode and an illicit relationship was developed by the 1st accused with the 2nd accused. To escape from that, the deceased took the rented house at Kollam and that is why his brother and wife started residing at Kollam. He further stated that he got the

telephone call on 21.4.2000 stating that on 15.4.2000 there were some discorded talk between the deceased and the 2nd accused and thereafter the deceased was not seen. It was stated by PW1 that he got information from the neighbours that on 15.4.2000 accused 1 and 2 together took his brother in a car. Thereafter on 23.4.2000 he identified his brother's body in a green bed-roll at the 6th hair pin curve on the route to Ooty. It was also stated that while the 1st accused was taken to the place of incident, PW1 was also taken there by the police and body was found at the place pointed out by the first accused. He identified the dead body. His statement was also taken at the time of inquest. He also produced Ext.P2 series complaints written to the police by the deceased against the 1st accused. He also clarified that when PW2 telephoned him, it was stated that the talk between the deceased and his wife was not cordial (കാര്യമായ സംസാരമൊ). In cross examination he stated that he is not aware whether accused 1 and 2 lived as husband and wife. He also stated that even though he did not like the marriage between the deceased and 2nd accused, their relationship was not inimical.

5. PW2 is a crucial witness. It is her house that the deceased and 2nd accused took on rent and were residing there. She, PW10 (her son) and her husband were living in that house. She stated

that the 2nd accused, her husband Vinod and their daughter (PW9) started to live in their house from 16.1.2000 onwards and there were no serious disputes in their life. They were not co-operative with the neighbours. After one week the deceased who took the house on rent in the name of Vinod stated that he was called Thampi by all people. He also stated to her that he was a Supervisor in PWD and he has got a transfer to Kollam. PW2 also stated that it is the 2nd accused who told her that the name of her husband is Vinod. The stamp paper was purchased in the name of Vinod. According to her, the 2nd accused asked her to change the rent deed in her name. On April 9th Sunday when she was about to go to the church, the 2nd accused and her daughter told her that they were going to their house at Attingal. They came back only on 12th. On 12th when Thampi came to her house for reading newspaper, he stated that he was not vacating the house. But, according to her, the 2nd accused told her that they were going to Attingal for getting a transfer to Vinod. PW2 further stated that the 2nd accused asked her whether there are ceiling for all rooms and she felt suspicion in that question. On 14th April rent was sent through her daughter PW9 and PW2 went towards their room. When she was standing outside, the 2nd accused told her that 'this is the last rent.' When she asked about that, the 2nd accused stated that no more rent (ഇനി ഒരു വാടക ഇല്ല). The 2nd accused did not invite her to the house.

The witness also added that the 2nd accused did not take anybody inside the house. They used to close the doors and windows. When she asked whether they will vacate the house next day, A2 stated that Thampi went to know regarding transfer and most probably they will vacate on the next day. On the next day she saw Thampi drawing water from the well. At 2.30 p.m. the 2nd accused came to the room of PW2 to have a call from her telephone. She dialled a local number and started conversation introducing her as wife of Vinod and asked for getting Vinod. After getting him she stated that come only at 6.30-7 p.m. When PW2 asked to whom she was speaking, A2 stated that she was talking to Vinod (her husband) regarding the question of transfer. She also stated that in the night brother will come for taking the household articles. At that time, the bike driven by Thampi was there and, therefore, PW2 asked whether Thampi has gone in the bike. Then the 2nd accused stated that he went in another vehicle. PW2 started suspicion on seeing the bike. Then the 2nd accused stated that she was having head-ache and PW2 replied that it may be migrane which is caused due to tension. At 4-4.30 p.m. PW2 heard murmurs and groaning from their room and it was that of Thampi. Then the radio started playing loudly in their room. She told her son that Thampi was in the room. At night 8.30 p.m. 2nd accused came to their house for making a telephone call. She was in a perplexed

condition. She telephoned to a mobile number saying that why so much delay (എന്താ ഇത്രയും താമസിക്കുന്നത്). She was in a difficult mood and PW2 thought that it might be due to migrane. PW2 also went outside along with her, but, she closed the door. Then through the opening panel of the window PW2 asked when the advance is to be returned. That was replied stating that Monday she will telephone her. At 9.30 p.m. PW2 found an ambassador car coming in the reverse direction and it was parked very close to the room of the 2nd accused. Husband of PW2 and her their children were seeing the T.V. Serial `Jai Hanuman'. Then a man who got down from the car without showing the face immediately got into the room of 2nd accused. There was a driver also in the car. The cooling glass of the car was closed. Immediately, the person who got down from the car entered the house. All the lights were switched off, but, T.V. and radio were playing loudly. When PW2 went to her kitchen, she heard a screaming sound that `I am to be killed' `who is catching me' ("എന്നെ കൊല്ലുന്നേ ആരാ എന്നെ പിടിക്കുന്നത്"). The above sound was heard from the room of the 2nd accused. She felt that some push and pull were taking place in that room and they were frightened. She understood that the above sound was from Thampi. Again she heard a cry stating that "I am being killed" ("എന്നെ കൊല്ലുന്നേ "). PW2 went

near their kitchen side, but, it was dark and daughter of the 2nd accused was calling her `anti anti' and she was crying. When she went there, CW3, her husband, and PW10, her son were present. Neighbours also gathered. Then the room of A2 was opened and the person who got down from the car was coming to the car. PW2 asked him what happened. Then he replied showing signs that the deceased has become mentally ill "തലയ്ക്കു നല്ല സുഖമില്ല". Thinking that somebody got shock, her son (PW10) switched off the main switch. When PW2 was going to the room of A2 she also saw that deceased Thampi who was trying to go outside was forcibly taken inside the room by A2. When A2 pushed Thampi inside, PW2 came near to the car. Then her son switched on the main switch. By that time, the person who came in the car was standing there. She asked him who is he. He stated that nobody (ആരുമല്ല). When PW2 stated that A2 told her that her brother will come, he replied that he is her brother. She asked what happened to the deceased, then it was answered that he was lying after consuming liquor. He was in a perplexed mood. PW2 asked A2 to open the room, but, light was not switched on inside the room. When she compelled, one panel of the door was opened by A2 and she stated that next day an operation had to be conducted to Thampi as there was something wrong with his

nerve, that Thampi was frightened for operation and that is why he was crying aloud. Later when she peeped through the panel of the door, she saw Thampi sitting near the door and asking A2 `who touched him'. Then A2 told him that next day he had to go for an operation. According to the witness, she was only acting to be heard by her. She also stated that Thampi has got `genny' (a type of high fever) and he bite her finger and injured. At 10 O' Clock A2 and the person who stated to be the brother took Thampi forcibly into the car and told PW2 that they were going to see the doctor. A2, her daughter and the deceased Thampi sat in the back seat. The person who stated to be the brother took the front seat. At the time when the vehicle started, A2 told her after lowering the glass little that next day she will call her. According to PW2, it was a white ambassador car bearing registration No.KL-2 E-5286. After half an hour, the person who was stated to be the brother and daughter of A2 came in an autorickshaw. Autorickshaw was stopped on the road side. When PW2 asked about Thampi, he replied that Thampi was taken to the General Hospital, Kollam. After 15 minutes they came out and they were having a bottle with water and a bag. He also told to the people standing outside that Thampi was in an unconscious stage. After they went back in the autorickshaw, PW2 telephoned to the District Hospital, Kollam and learned that nobody by name `Thampi' or

`Vinod' was admitted in the hospital. On 17.4.2000 A2 telephoned her and stated that she was calling from her house at Attingal, she will come on Saturday for taking the household articles and advance rent should be returned on that day. Then PW2 asked her why she did not state that Thampi was in the house on 15.4.2000, she stated that when Thampi came back, PW2 was praying. She further stated that Thampi had an accident three months ago and there was bleeding through the ear. Since A2 was talking contrary versions, PW2 asked her to give the phone to Thampi. At that time, she stated that doctor has given sedation to him and he is taking rest. PW2 also informed her that advance money can be given only if Thampi comes as she has got some doubts and if necessary cheque can be given. Then the telephone was cut. On 21.4.2000 she telephoned PW1 at Poojappura Police Station that from 15.4.2000 onwards Thampi was not seen and immediately to come there. On 22.4.2000 the person who stated to be the brother and A2 came in a mini lorry for taking the household articles. PW9 (daughter of A2) was also with them. When she asked about Thampi, A2 stated that he was not well. A2 told that his hands cannot be moved and there will be an operation. When PW2 told that she will telephone to police, A2 replied that why should police be informed and whether PW2 will compensate her if she is ashamed by the people and she wanted to go from there without taking back the

advance and articles stating that she did not want the advance or household articles. But, they did not permit it and police was called. Police came there and questioned A2 and the person who accompanied her as brother . They also learned that the name of that person was Raju, he was in the Army and the real name of the person who was residing with A2 was Vidhukumaran Thampi. Police took them to the police station. It was stated by PW2 that Rs.5,000/= was given as advance and Rs.850/= was the monthly rent. It was also stated that on one side of her house there was a visiting room, bed room and kitchen and those three rooms were given on rent. Through the same courtyard one has to enter in the visiting room. She identified A1 as the person who came there as brother and took Thampi in the car. She got suspicion over them relating to missing of Thampi. She was separately cross examined on behalf of A1 and A2 even though A1 and A2 were represented by the same advocates before the trial court. Evidence of PW2 is fully supported by PW10, son of PW2. PW5 and PW15 are neighbours living very close to the house of PW2. They also identified A1 and A2 and they also stated that those persons came there for taking out household articles. Nothing came out from the cross examination of PW2. The evidence of PW5 and PW15 neighbours fully supported the evidence of PW2. Even though another neighbour (PW6) became hostile, he did not

support the prosecution. His evidence was not helpful to the defence also.

6. PW5 was residing very close to the house of PW2. He deposed that A2 and deceased lived in the house of PW2 on rent. On 15.4.2000 at about 9.30 p.m. while seeing T.V., he heard a sound. When he entered the courtyard, he saw deceased was taken in a car by A1 and A2 together. Later he saw them when they came together to take articles from the house. Only when he saw the newspaper he understood that A1 was the paramour of A2. PW15 is also a close neighbour of PW2. He also deposed that A2, deceased and their daughter were living in the house of PW2 on rent. One day while he was watching T.V. he heard a sound "അയ്യോ". When he looked, he saw an ambassador car came in reverse and parked near the house of PW2 and he saw A1 and A2 together taking the husband of A2 in the ambassador car telling that Thampi is not well. He identified A1. PW2 told him that A2 introduced to her A1 as her brother. He stated that it was on 15.4.2000, he was not sure about the date. On 22.4.2000, accused together came with a lorry to take away the articles in the rented house and to demand advance from PW2. PW2 stated that unless husband of A2 came she will not return the advance. As advised by PW15, she also called broker. PW2 called

police and police has taken the accused to the police station. He also stated that he saw A1 and A2 together taking the deceased in the ambassador car. PW10, son of PW2, deposed in terms of deposition of PW2. Evidence of PW2 is fully corroborated by evidence of PWs 5, 10 and 15 and their evidence was not shattered in cross examination. We see no ground to disbelieve the evidence of PW2 corroborated by evidence of PWs 5, 10 and 15.

7. PW3 is another star witness. He was declared hostile. According to the prosecution, it is PW3 who was alleged to have taken the dead body to Ooty in the taxi car bearing registration No.KL-4A-6595. In the chief examination he stated that he is a lorry driver and during 2000 he was driving a trucker. He stated that he never driven an ambassador car and he was very positive that he never drove the car bearing registration No.KL-4A-6595. He also stated that on 18.4.2000 morning he did not go to the house of A1 in the rented house at Kumarapuram. He was very positive that he never travelled with the accused or their daughter to Ooty and he has not stated anything to the police. After declaring hostile public prosecutor was permitted to put questions in cross examination. In cross examination also he was very positive that he never went to Ooty and the entire 161 statement recorded by the police were denied by him. It has

come out in record that PW3 was prosecuted for perjury in M.C.No.35 of 2006 in S.C.No.998 of 2004 and he was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs.500/= under Section 344 Cr.P.C. In that case, he admitted that he was forced to depose like that in view of the pressure of A1. Anyway, we are not concerned with the evidence in the perjury case and we are not considering the same while appreciating the evidence in this case. In this connection, we refer to the evidence of PW11, the owner of the Car KL-4A-6595. PW11 stated that he was the owner of the above car. He also stated that the above car was driven by Pradeep (PW3) during 2000 and his services were terminated because he has taken a dead body to Ooty. This car was taken into custody by the police and he took the car on bond. It is also stated that after returning from Ooty he gave the amount for the trip to Ooty. The car was having All India permit. The way bill given by Pradeep was entrusted with the police. Police has taken the car into custody on the 2nd day after returning from Ooty. PWs 13, 54 and 55 also support the case that this car KL-4A-6595 was taken to Ooty on those days. In these circumstances, we disbelieve the evidence of PW3 and on the basis of evidence of PW11, 13, 31, 32, 54 and 55 we find that PW3 was the driver of the car KL-4A-6595 owned by PW11. PW13 deposed that A1 came to Ooty with an ambassador car for repairs on 19.4.2000. PW48

Panchayat Secretary deposed that KL-4A-6595 owned by PW11 was driven by PW3 during the relevant period. PW3 was living four houses away from his house. On his request, PW3 was given the job of driver by PW11. When police came, he showed the house of PW3 to police. When he was examined again, he deposed that in MO VII(a)(1) photograph which was taken on the side of a lake, photo of PW3 is also seen. PW54 who is conducting lodge in Coonoor near Ooty deposed that A1 took two rooms on 19.4.2000 and he has identified photos marked as MO VII(a) series as taken in Ooty near lake etc. PW55 also deposed regarding the photos. Exts.P11, P11(a) and (b) proved by PW31 shows that Tourist Taxi KL-4A-6595 owned by PW11 passed through Chavady check post (Tamil Nadu) and witness proved tax receipts Exts.P11(a) and P11(b) which are receipts kept in the ordinary course of business. Evidence of PW32 shows that KL-4A-6595 was seized by the police by Ext.P12 mahazar on 22.4.2000.

8. Now, we will come to the evidence of PW4. He stated that he was a tempo driver and he denied his 161 statement that he has taken the deceased Thampi, his daughter and accused 1 and 2 in the car on 15.4.2000 to the house at Kumarapuram from the house of PW2. He was declared hostile, but, prosecution was permitted to cross-examine. He stated that he is not aware who is the owner of the

car bearing registration No.KL-2 E-5286, but, when asked pointedly he stated that he cannot deny that he has never driven KL-2 E-5286. He stated that he is not remembering. Later he denied it. He was completely hostile to the prosecution. PW27, owner of the car, stated that the car belongs to his daughter and he is managing the same. He was declared hostile and he has denied his 161 statement and stated that at that time the vehicle was looked after by the father-in-law of his daughter and he cannot say anything whether it was used as taxi at that time etc. His evidence was not helpful to the prosecution as well as to the accused.

9. PW7 deposed that he was working as Manager of Aramath Madom Lodge in Karunagappally. According to him, the accused were known to him and they stayed in a room in the above lodge (പ്രതികളെ അറിയാം. ഇവർ ടി ലോഡ്ജിൽ റൂം എടുത്ത് താമസിച്ചിരുന്നു.). It was room No.204 which was taken on 11.4.2000 and it was taken in the name of Vinod. The room was vacated on 15.4.2000 at about 8 p.m. and at that time he was in the reception duty. On the day when the room was vacated, a telephone call came asking for Vinod and he heard Vinod stating that whether medicine was administered as told by him, whether he was sleeping and whether should he come. ("ഞാൻ പറഞ്ഞതുപോലെ മരുന്നു കൊടുത്തോ? ഉറങ്ങിയോ? ഞാൻ വരട്ടേ" എന്നാണ്

വിനോദ് ഫോണിൽ സംസാരിച്ചത് .) Immediately after the telephone call, he vacated the room. PW7 also identified both accused as persons who stayed in the lodge together, but, in cross examination he stated that he is not aware to whom he talked over the phone. According to the prosecution, this supports the evidence of PW2 regarding the telephone call made at about 8.30 p.m. on that day to one Vinod by A2 and later A1 arrived in an ambassador car by 9.30 p.m. A2 introduced A1 as her brother. According to the prosecution, it proved the charge of conspiracy also. Since the second accused was living with her husband in the house of PW2 which was taken on rent in the name of Vinod and the room in the lodge was taken by A1 in the very same name, it will show that there was a previous plan and it was as per that plan A1 asked A2 whether medicine was administered, whether the deceased started sleeping etc. This will prove the offence of criminal conspiracy. In this connection, we shall also consider the evidence of PW30. He was also working as the Manager of Karunagappally Amarathumadom tourist home. He stated that as per the inmate register, Room No.204 was taken by one Vinod. T.A.I., V.S.S.C., Peroorkada, Thiruvananthapuram on 11.4.2000 at 10.30 p.m. and it was vacated at 8 p.m. on 15.4.2000 and PW7 was doing duty at that time. That part of his evidence corroborates the evidence of PW7. He also stated that police has shown him the person

who took the room and he has identified him, but he cannot positively identify A1 as the person who took the room as thereafter he has not seen him again and he cannot remember clearly. He further stated that Room No.204 is a double room. Exts.P10 and P10(a) were marked. During cross examination by A1 it is stated that as per Ext.P10 register it was taken for the stay of a person. He also stated that on all days same person need not be the Manager. PW36 attested the mahazar when the police seized Ext.P10 registers from the lodge.

10. PW8 stated that she knew A1. She has rented out her house at Kumarapuram to him after getting Rs.10,000/= as advance. Rs.1,500/= was the monthly rent. But, the rent deed was given in the name of one Santhosh Kumar. A1 told her that he has a wife and a child. When he gave the advance, he stated that wife and child were sitting in the autorickshaw. Only from the newspapers she came to know that actually Santhosh Kumar who took the house on rent was the first accused Raju. She also stated that one or two times Raju came to the house of her sister for giving rent and she has seen him. So evidence of PW8 shows that A1 has taken out the house at Kumarapuram on 12.10.1999, but, he has taken the house in the name of Santhosh Kumar.

11. Now, we will come to the evidence of PW9, child of the 2nd accused and deceased. She was examined in court on 15.4.2005 after five years of the incident. She was only nine years and was studying in the 4th Standard at the time of incident. Deposition shows that she was tutored as she stated in the beginning that `I do not know' (എനിക്കറിയത്തില്ല). It is recorded by the trial Judge that when she was asked questions, she started saying `I don't know', even without taking any time, but, she stated that one Asha was sitting near her in the school and she was not aware whether she got more marks than Asha or not. She also stated that she got `A' grade in the school and progress report is being signed by her mother. But, she answered questions of general knowledge correctly. After putting certain questions trial court entered an opinion as follows:

> "The witness is very active, intelligent and capable of answering questions. But she shows some sort of ready hesitation to answer past events and questions relating to years within her memory."

She stated that she is not remembering any incident on 15.4.2000 and she is not aware whether mother has conducted a business in a shop. Sine she has completely denied 161 statement, she was allowed to be

cross examined by public prosecutor. She was recalled on 27.6.2005 as photos were developed from the camera seized from the house of A1 as ordered by the Sessions Judge. Some photos were shown to her and she stated that she identified photo of A1 as the person who was standing in the box, but, she cannot say whether the woman in the photo was her mother or not as she has not seen her mother in a photo. (നാളിതുവരെ ഞാൻ അമ്മയെ ഫോട്ടോയിൽ കണ്ടിട്ടില്ല.) When she has shown her own photo, she stated that she cannot say whether it is her photo or not. Then she has shown a photo of a child sitting on a horse and she stated that she cannot say whether it is her photo, but, among the photos, in 11 photos she admitted that A1 was present and the only difference was that in the photo there was no beard, but, the person in the box was having beard and she admitted that in five photos A1 was seen embracing her. She further stated that the woman standing near A1 was her mother and in the four photos A1 has put hands on her mother's shoulder, but, she cannot identify whether it was taken in a garden. In four photos a lake can be seen and out of the above in two photos her mother and A1 were there. It is recorded as follows:

> "എന്നെ ഇപ്പോൾ കാണിച്ച ഫോട്ടോകളിൽ 11 എണ്ണത്തിൽ പ്രതിക്കൂട്ടിൽ നിൽക്ക ുന്ന അങ്കിൾ ഉണ്ട് . ഫോട്ടോയിൽ കാണുന്ന അങ്കിളിന ു താടി ഇല്ല. ഇപ്പോൾ കൂട്ടിൽ നിൽക്ക ുന്ന

അങ്കിളിന് താടി ഉണ്ട് . എന്നെ ഇപ്പോൾ കാണിച്ച 5 ഫോട്ടോകളിൽ ഈ അങ്കിൾ ക ുട്ടിയെ കെട്ടിപ്പിടിച്ച ുകൊണ്ട് നിൽക്കുന്നതായിട്ടാണ് കാണുന്നത് . ഈ ഫോട്ടോകളിൽ അങ്കിളിന്റെ കൂടെ നിൽക്ക ുന്ന സ ്ത്രീയാണ് ഇപ്പോൾ പ്രതിക്കൂട്ടിൽ ഈ അങ്കിളിന്റെ അടുത്ത് നിൽക്കുന്നത് എന്നു പറയുന്നത് ശരിയാണ് . ഈ ഫോട്ടോയിൽ കാണ ുന്ന സത്രീ എന്റെ അമ്മയാണ് എന്ന ു പറയ ുന്നത് ശരിയാണ് . അങ്കിൾ അമ്മയ ുടെ തോളിൽ കയ്യിട്ട ു കെട്ടിപ്പിടിച്ച ു നിൽക്കുന്നതായി എന്നെ ഇപ്പോൾ കാണിച്ച 4 ഫോട്ടോകളിൽ കാണുന്നു. ഈ ഫോട്ടോകളിൽ തടാകം ഉള്ള സ്ഥലം കാണുന്നു. പൂന്തോട്ടമാണോ എന്നെ ഇപ്പോൾ കാണിച്ച ഫോട്ടോയിലെ സ്ഥലം എന്നറിയില്ല. എന്നെ ഇപ്പോൾ കാണിച്ച 4 ഫോട്ടോകളിൽ തടാകം കാണ ുന്നുണ്ട്. അവയിൽ രണ്ടെണ്ണത്തിൽ പ്രതിക്കൂട്ടിൽ നിൽക്ക ുന്ന അങ്കിള ും അമ്മയ ും ഉണ്ട് . "

Thereafter it was recorded by the trial court that defence counsel prompted and she stated that `I don't know'. Then she stated that in one of the photos there is a person with turban and mother's finger was bandaged due to injuries and in the photo there was also a youngster wearing pants. Evidence of PW9 shows that she, A1 and A2 have seen in some of the photos shown to her and in one of the photos, a man with a turban was also there.

12. PW12 who was examined to show that A1 came in a car and took petrol from the petrol bunk at Ooty where he was working has not identified A1 and was declared hostile. PW13 who was working as a car mechanic at Ooty identified A1. He stated that

A1 came to his garage with an ambassador car for repairs on 19.4.2000. One Sardarjee by name Gurdeep Singh brought him and the said Sardarjee is related to his wife. Evidence of PW13 clearly shows that A1 was in Ooty and he went to the workshop of PW13 for repair of the car along with Gurdeep Singh. Gurdeep Singh was examined as PW55. He stated that he is residing in Ooty for the last 30 years selling sweets. MO VII(a) series photos were shown to him. In (MO VII(a)(3) photo it is stated that he was embracing a small child. In another photo (MO VII(a)(4) he and another person were there with the child. A small child, another man and a woman were there in MO VII(a)(5). He has also shown a photo in which the same persons were travelling in a boat and he stated that MO VII (a) series (25) photos were taken from botanical garden and MO VII (a)(b) was taken from the lake in the botanical garden. He identified A1 as the person who was in the photos. He also stated that earlier also he knew A1 when seven years ago his mother was treated in the Minitary hospital. He further stated that PW13 workshop man was related to him and he has taken A1 to the workshop for repair of the car. A1 came to his house at about 2-3 p.m. and by 4-5 p.m. they returned. Even though he stated that he was not aware of the name of A2, he identified A2 in the box as the person who was in the photo. After taking the photos he was seeing the persons again first time in the

box. In cross by A2 he stated that he was not aware whether A2 was the wife of the A1 and in cross by A1 also he stated that he was not aware who took the photo. With regard to the marking of photos there were serious objections raised by the appellants. Immediately after the body was found, there was a search in the house at Kumarapuram. The search was conducted on 27.4.2000 and after the search Ext.P9 mahazar was prepared. Various items were recovered from there by the police which included Factomphose, bonemeal, yellow flowers and many types of tablets and bottles and injections. It was specifically mentioned that they saw three strips containing 10 tablets each of Phenobarbitone Tablet IP Gardinal-60, one strip of 10 tablets of Phenogan-25, Digorin Tablets I.P.0.25mg., two strips of 10 numbers each of Lenoxin Tablets, Insulin zine suspension I.P. Insulin lente I.P. Purified-40, Precision Gllde Needle-18G and another needle of 1 ½ TW (1.2x38mm) and a 2ml.B.D. plastic needle etc. were seized. They also saw some tablet powder in a paper. A watch, one Nokia cellular phone without charge and a Camera `Yashika-MD-35 F-Motor Vind' etc. were also recovered from there. It is stated by the trial Judge that it is a culpable omission in not sending the camera and phone for examination by experts in appropriate time. At paragraph 61 of the judgment, the following observations were made by the Sessions Judge:

> "61. xx xx xx
> 1. There is a clear reference to the use of a mobile phone by the 1st accused to conversate with the 2nd accused during the relevant period. A mobile phone was seized from the house of occurrence at Kumarapuram as per Ext.P9 scene mahazar dated 27.4.2000. M.O.VII camera was also seized from that house as per that mahazar on the very same date. They both were produced before court as per Ext.P-35(3) property list as item Nos.13 and 14. No effort was made during the investigation either to scan the mobile phone or to detect the presence of a used film in the camera. After commencement of the trial the learned Addl. Public Prosecutor filed Crl.M.P.No.2165/05 to sent M.O.VII camera to the chief photographer, State Police Photographic Bureau, for developing the film if any found loaded in it. The prayer was allowed vide order dated 27.6.2005 on Crl.M.P.No.2165/05 was upheld by the Hon'ble High Court in Crl.M.C.No.1925/05, preferred from the defence side. In my view, the omission to examine the mobile phone and camera by experts in appropriate time is a culpable omission on the part of the investigating officer and it is liable to be enquired into by higher police authorities."

It shows how the photos were developed. Accordingly, those 25 photos were produced and marked as MO VII(a) series. Since photos were developed after examination of witnesses, the witnesses who were seen in the photographs were recalled and examined. It can be seen that even the child identified A1, A2, her mother, and herself

along with a person with turban i.e., PW55 in the photos. PW55 identified the photos. The court itself sent the camera taken from the house at Kumarapuram for development of photos and it is true that 25 photographs were able to be developed from the unfinished film roll inside the camera. It is argued by the counsel for the defence that even if those photos were taken, it cannot be stated that the photos were taken on 18.4.2000 or 19.4.2000. But, at least it will show that there was intimate relationship between A1 and A2, that photos of A1, A2 and PW9, the daughter of A2, were taken in a lake side and that in one photo picture of PW55 was also there and we need not disbelieve the evidence of PW55.

13. PW56 is the Investigating Officer. Inspection memos of A1 and A2 dated 22.4.2000 were produced and marked as Exts.P23 and 23(a). In Ext.P23(a) inspection memo of A2, it is noted that there is an injury on the middle finger of A2. It was treated by PW42 and Ext.P16 is the wound certificate. Ext.P7(a) leave certificate shows that A1 who was Military Hospital Nurse was on leave during this period. PW56 Investigating Officer further deposed that A1 has disclosed in his confession statement on 22.4.2000 that the dead body which was tied and covered in a bed roll was taken in the dicky of a car and dropped into the 6th hairpin on the way to Ooty and if he

is taken there, he can show the place and dead body. He deposed as follows:

> "22.4.2000തിയ്യതി 1- പ്രതി പറഞ്ഞ പ്രകാരം സമ്മതമൊഴിയിൽ "bed roll-നുള്ളിൽ പൊതിഞ്ഞു plastic കയറിട്ടു കെട്ടിമുറുക്കിയ dead body കാറിന്റെ ഡിക്കിയിൽ കയറ്റി ഊട്ടിക്ക പോകുന്ന വഴിയിലെ 6- നമ്പർ ഹെയർപിൻ വളവിനടുത്തു കൊക്കയിൽ ഇട്ടിട്ടുണ്ട് – എന്നെ കൊണ്ടുപോയാൽ ആ സ്ഥലവും dead body-യും കാണിച്ചുതരാം"

He also mentioned that the same confession as stated by A1 is recorded in the inquest report (Ext.P14) also. The statement which led to the recovery was repeated as such before the court by the Investigating Officer. It is also stated that PW23 has taken the photos of the dead body and the dead body was found out from the place shown to them by the accused. The dead body was identified by PW1, brother of the deceased, PW17, brother-in-law of the deceased, PW21, first cousin of the deceased and PW49, father of the deceased, and inquest was prepared in the presence of PW50 and other persons. Photos were taken before untying the knots with plastic mat and after removing the plastic mat. It is further stated that the body was straightened and thereafter also photos were taken. The plastic coir, bedholder, plastic mat, coir etc. were taken into custody by Ext.P14. The evidence of PWs 1, 17, 18, 21 and 49 support the recovery of the

dead body as pointed out by A1. They also stated that the police party came along with the accused in Tata Sumo vehicle driven by PW18 and it stopped at the place pointed out by A1 and recovery was accordingly made. It was argued that a dead body with rigor mortis cannot be straightened easily. The dead body was recovered after five days of the death and there was no rigor mortis at that time. The fact fact body was straightened was deposed by more than three witnesses and they were not cross examined on that aspect. The photos were also shown and marked. Those photos also show the original position when it was tied and after the body was straightened. The postmortem certificate also shows that straightened body was sent for postmortem.

14. Ext.P13 is the postmortem certificate. PW37 doctor conducted postmortem. The doctor has stated that the body was in a decomposition stage. With regard to the appearance of the body it is stated as follows:

> "Appearances found at the post-mortem- Body lies on its back, found to be in a state of decomposition. There was fracture of Left maxilla, mandible, zygoma bones. The tongue protruded outside the mouth. Teeth found incomplete. No external injuries, except the coir marks found on both upper limbs, chest and neck."

It is further stated as follows:

> "The viscera was sent for chemical analysis through police and we received the report. Except the preservative sodium chloride and soil around the body, all the parts of the viscera showed phenobarbitone poisoning. After perusing the chemical analysis report I gave the final opinion as the death could be due to phenobarbitone poisoning. Shown to me is the certificate issued by me and it bears my signature and office seal-Marked as Ext.P-13. Fracture in the body could have been occurred at the time of throwing the body after death. The body was found intact and it could be identified by persons who know the deceased previously."

In cross examination he was asked whether an injection mark was on the body, it was stated that after three days of death such marks cannot be noted. Postmortem report as well as chemical analysis report show that the death was due to administration of phenobarbitone poison. It is true that even though in the charge sheet it was mentioned that Furidan was also administered to him, there is no evidence of administration of furidan though furidan was also seized from the house of A1 at Kumarapuram. With regard to the purchase of phenobarbitone, it is the case of the prosecution that it was purchased from the shop of PW33 who was running `Saroja Medicals'. He denied having sold Syringe, Needle, Gardinal-60, Phenobarbitone tablets, phenergon tablets to the first accused. He

was also declared hostile and public prosecutor was allowed to cross examine him. Even though he has stated that he has no licence to sell phenobarbitone and he is not selling the same during cross examination finally he stated that he is selling Gardinal i.e., phenobarbitone. In this connection, we have also seen that the scene mahazar taken from the rented house of A1 at Kumarapuram also shows that strips of Gardinal phenobarbitone tablets were shown there. The chemical analysis report of the powder found in a paper was also found to be of phenobarbitone. So, availability of phenobarbitone in the house of A1 cannot be denied. It is not explained also.

15. PW20 is the father-in-law of A1. A1 married his daughter Raji. She died during 2nd delivery in the operation room. According to him, he has doubts about the death of his daughter. Stating that it is vitamin tablets, A1 gave two tablets to Raji and he made complaints in this regard to the police as he has suspicion regarding the death. After the death of her daughter Raji, A1 never came to the house of PW20. Since he was told that A1 was staying with A2 at Krishnapuram, he went and enquired at the shop of the deceased near Pangode Military Camp. It was seen closed. But, on his enquiry he understood that what he heard was true. PW39 was

the Sub Inspector during the relevant time at Kayamkulam Police Station. He received a complaint from the deceased by post. The complaint is that his wife and daughter were abducted by A1 and were keeping in a rented house at Krishnapuram. The complaint is Ext.P6. On that basis, police called the parties to police station. But, finally, since the complaint was registered in another police station, case was not registered. In this connection, we also refer to Exts.P2 and P2(a) complaints which are produced by PW1. Exts.P2 and P2(a) also show that deceased in Ext.P2 dated 2.7.199 complaint stated that his wife and child were abducted by A1. In Ext.P2(a) complaint it is stated that he had business dealings with nine persons mentioned therein including A1. Since he had differences with A1 regarding many dealings they were separated and they were trying to kill him and his family members and he wanted police protection.

16. Now, we will come to the defence evidence. DW1 deposed that he was residing at Krishnapuram and friendly with family members of A1. According to him, 1st accused was there on 14th, 15th, 16th and 17th till 22nd of April, 2000 as he was on leave (leave certificate (P7(a)). He stated that on 22nd police came and taken A1 at about 10 a.m. He also statd that before the matter was disclosed in court (19.12.2005) he never disclosed to anybody the

fact that he has seen that A1 was taken by police on 22.4.2000. He also stated that he has not seen the leave certificate of A1. He denied the suggestion that he is the son of father's brother of A1. DW2 was examined to show that A1 has married one Raji, daughter of PW20. A1 got a job for Raji after promising Rs.2,00,000/=. After her death, PW20 wanted that, that job should be given to his second daughter which was not accepted by A1. Therefore, they were inimical. DW3 was examined to prove that A2 was legally married on 13.12.1986 to one K. Raju (not A1) as per Ext.D3 register. He was examined to show that A2 has not married the deceased. DW4 is the brother of A1. He deposed that daughter of PW20 was married by A1. After her death, PW20 tried to get him married to sister of Raji. Since he did not agree PW20 was inimical to him. To a question he answered that PW20 tried to get her younger daughter also to be married by A1.

17. In 313 statement A1's case is that from his friend Boban deceased has borrowed Rs.1,00,000/=. To get the money back he along with his friend had gone to the house of deceased at P.T.P. Nagar. But, house was closed. He also came to know that deceased was evicted by some other creditors. His friend Boban is now at America. His wife Raji died due to bleeding in a cesarian operation

on 26.1.98. PW20 wanted the job of Raji to be given to his 2nd daughter. Since that was not agreed, he was arrayed as accused. He denied all incriminating circumstances pointed out to him.

18. A2 in her 313 statement stated that she married one Raju from Attingal. He was in Gulf. Deceased was his friend. She came to Thiruvananthapuram for studying a course. She went for an interview with the deceased to Ernakulam. Thereafter they were living together. Further they were staying together in PTP Nagar. Deceased was getting amounts from various parties, promising that he will arrange big loans. Since that was not done, people who gave money demanded back their money. So he left the place. In 1999 he came back and started a shop. When creditors went there also, he again left the place. Thereafter she heard that deceased was living with another lady and after 1999 she has not seen him. But, when she was heard regarding punishment, she stated that her daughter (PW9) was born to her on deceased and his earlier statement that she was born to her first husband is not correct.

19. It was argued that there is no direct evidence and prosecution failed to prove by establishing the chain of circumstances that accused were guilty of the crime. In the absence of direct

evidence, for convicting an accused on the basis of circumstantial evidence, it should be proved leaving no doubt that the only conclusion possible from circumstances proved is that accused alone is guilty and nobody else is guilty. Mere suspicious circumstances alone is not enough to convict a person under section 302 IPC. It is true that commission of offence can be proved by circumstantial evidence. But as held by the Apex Court in **Balwinder Singh** v. **State of Punjab** (AIR 1996 SC 607) that in a case based on circumstantial evidence the court has to be on its guard to avoid the danger of being swayed by emotional considerations. For convicting the accused generally on the basis of circumstantial evidence, court should be satisfied that all the links in the chain are complete and the only hypothesis possible on the basis of the evidence adduced is that accused and the accused alone is guilty of the offence. (**See C.K.Raveendran** v. **State of Kerala** (JT 1999 (9) SC 408) and **Jaswant Singh** v. **State (Delhi Admn)** (AIR 1979 SC 190). Circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence as held by the Apex Court in **Mangaleshwari** v. **State of Bihar** (AIR 1954 SC 715)**.** It has been repeatedly held by the Supreme Court that the distinction between 'may be true' and 'must be true' is long and divides vague conjectures from sure consideration and each link

must be established by clear and unobjecting circumstances. In **State of Kerala** v. **Ramachandran** (1999 (3) KLT 512), Chief Justice Arijit Pasayat (as he then was) observed for the Bench as follows:

> It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused."

The Apex Court in **Sharad** v. **State of Maharashtra** (AIR 1984 SC 1622) prescribed five principles for convicting an accused on the basis of circumstantial evidence which are as follows:

> 1. the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.
>
> 2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

> 3. the circumstances should be of a conclusive nature.
>
> 4. they should exclude every possible hypothesis except the one to be proved; and
>
> 5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

It is well settled principle that unlike direct evidence, circumstances which throw light, should lead from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction. As far as this case is concerned, we are of the opinion that the totality of evidence adduced in this case would clearly lead to the conclusion that A1 and A2 planned together to kill the husband of A2 and as a result of the plan and conspiracy he was murdered by administering phenobarbitone. On a reading of the evidence together, we are of the opinion that chain of circumstances is complete. We shall now enumerate some of the circumstances proved in this case:

(1) Motive suggested by the prosecution was illicit relation of A2, wife

of the deceased, with A1. It was proved by Exts.P2, P2(a) and P6 letters written by the deceased to the police. To prove the motive of avoiding the deceased who happened to be an obstacle in the relationship between A1 and A2, prosecution marked Exts.P2, P2(a) and P6 complaints, wherein specific allegations have been made against the first accused. Ext.P6 complaint was registered as petition No.367/99 of Kayamkulam Police Station. The first accused is the respondent in the said petition. All the parties were summoned to the police station. On enquiry it was clarified that an investigation is already going on, in Vattiyoorkavu police station in respect of a very same complaint. So no follow up action was taken by the police. Ext.P4 rent deed would show that A1 took a house at Kumarapuram, A1 and A2 were living at Kumarapuram as husband and wife and house was taken on rent by A1 in the name of Santhosh Kumar as deposed by PW8. A2 developed illicit relationship with A1 is also proved by depositions of PWs 1, 16, 22, 25, 46, 49 and 55. It was corroborated by evidence of PW9 daughter of the deceased that MOVII (a) photos contain photos of A1, A2 and herself. PW21 also deposed that A1 and A2 behaved as husband and wife when the deceased going out of the shop in Pangode. He also deposed that Thampi stated to him that matters are compromised and planning to stay away somewhere to escape from A1.

(2) Since dispute with A1 was compromised, deceased decided to stay away from Pangode. A2 and deceased were living in the house of PW2 on rent as husband and wife from January, 2000 (rent deed Ext.P3) and house was taken in the name of Vinod, but, Vinod was called as Thampi. They were living with their daughter PW9. This is evident from the evidence of PW2, landlady, her son PW10, PWs 5, 6 and 15 close neighbours.

(3) On 15.4.2000, A1 and A2 forcibly took deceased in an ambassador car as seen by PWs 2, 5, 10 and 15.

(4) PWs 2, 5, 10 and 15 heard cries of the deceased from the house before he was taken away from the house. Even PW6 who was declared hostile heard sounds and and loud cries of a man. By 9 O' clock he also saw an ambassador car coming in reverse to the house rented out by PW2 to A2.

(5) As per Ext.P17 scene mahazar which was prepared when the house belonging to PW2 where A2 and deceased were staying on rent was searched, driving licence of Vidhukumaran Thampi, ration card with name R.V.Thampi etc. were seized and in the ration card head of

the family was mentioned as R.Vidhukumaran Thampi. Blood stains also seen on the door of the hall to the courtyard. This shows that A2, deceased and PW9 were residing together in the house of PW2 and blood stains were seen on the door.

(6) Evidence of PW2 shows that A2 has stated that deceased bite her finger. Arrest (Inspection) memo Ext.P23(a) shows that when A2 was arrested, she had wound on right finger. Ext.P16 wound certificate shows the same. In MOVII(a) series photos also A2 is seen with injured finger.

(7) After taking away of deceased by A1 and A2 nobody has seen the deceased. Even A2, who was living with the deceased, has no explanation what happened to her husband though she admitted that PW9 was born out of deceased. Even though it was stated by A2 that he is being taken for test in District Hospital, when PW2 enquired, deceased was not admitted in the hospital.

(8) Incident as narrated by PW2 and corroborated by her son PW10 and neighbours PW5 etc., A1, A2 and PW9 came back on the same day to take articles from the rented house.

(9) It was proved by evidence of PWs 2, 5, 15 etc. that A1 and A2 came back to take away the household articles through a lorry. In fact A1 and A2 were arrested by the police on the information given by PW2 at that time.

(10) A1 and A2 lived together in the rented house at Kumarapuram. PW8 is the landlady of the house occupied by A1 and A2 on the basis of the rent deed in Kumarapuram. She has stated that A1 has executed Ext.P4 rent deed in respect of the above referred building. The name was shown as Santhosh Kumar. First accused who was identified by PW8 in the court represented that "ഭാര്യയും കുഞ്ഞും ഓട്ടോയിൽ ഇരിപ്പുണ്ട്."

(11) Even though PW3, driver of the ambassador car which allegedly took the dead body and threw the same on the way to Ooty, was declared hostile, the car owner's (PW11) evidence shows that he engaged PW3 as the driver during the relevant time and trip sheet shows that the car KL-4A-6595 was taken to Ooty. This is further proved by check post documents like Exts.P11(a) and P11(b).

(12) Presence of phenobarbitone tablets and powdered phenobarbitone tablets in the house of A1 taken on rent at

Kumarapuram from PW8 coupled with Ext.P15 chemical analysis report show that death was due to administration of phenobarbitone which also support the case of the prosecution.

(13) The following articles were recovered vide Ext.P9 scene mahazar from the residence of A1 and A2 at Kumarapuram. MO4 Mobile Phone, MO5 Furidan packet, MO6 two packets white powder, MO7 Camera, MO8 Cotton, MO11 watch apart from tablets, syringe, medicine, one maxi, some quantity of phactomphose and manure (എല്ലുപൊടി). Therefore, the one dispovan syringe and needle were recovered at the instance of confession made by A2 vide Ext.P30 seizure mahazar. The plastic coir was recovered at the instance of confession made by A1 vide Ext.P31 seizure mahazar. The articles above referred were sent for analysis. Ext.P36 is the analysis report. Ext.P36 proves that phenobarbitone, a pshychotropic drug was detected in two strips of tablets and newspaper packet containing granular materials. The maxi was found blood stained and the result of chemical examination revealed that it contains human blood.

(14) Arrest was made when PW2 informed the police when A1 and A2 came to take the household articles in lorry from the rented house.

(15) Evidence of PW2, PW16 and PW21 supports the finding on criminal conspiracy. PW2 proved that A2 made a telephone call at 2.30 p.m. stating that "വിനോദിന്റെ ഭാര്യ ആണ് . വിനോദിനെ കിട്ടണം ." After some time she continued "ആര് 'അതുപോലെ, ആര്. അങ്ങനെതന്നെ, രാത്രി ആറര, ഏഴ് മണിയോടുകൂടി വന്നാൽ മതി". She heard some unusual sound from the residence of the second accused at 4 O' clock. "അവർ താമസിക്കുന്ന മ ുറിയിൽ ഒര ു മൂളല ും ഞരങ്ങല ും ശബ്ദം കേട്ട ു. ആ ശബ്ദം തമ്പിയുടേതായിരുന്നു എന്ന് എനിക്കു മനസ്സിലായി." A2 making another phone call at 8.30 p.m. She was found disturbed. Dialled a mobile number and asked "എന്താ ഇത്രയും താമസിക്ക ുന്നത്. She was found furious. PW7, Manager of the lodge, deposed that at about the same time A1 was talking over telephone "ഞാൻ പറഞ്ഞത ുപോലെ മര ുന്നു കൊടുത്തോ? ഉറങ്ങിയോ? ഞാൻ വരട്ടേ". A1 vacated the room thereafter. At 9.30 p.m. A1 came in an Ambassafor Car "കാറിൽ നിന്ന് ഒരാൾ ഇറങ്ങി എനിക്കു മുഖം തരാതെ വിനിതയുടെ മുറിയിലേക്ക് പോകുന്നത് കണ്ടു." (Identified A1 as the said person). Then she states that "ടിയാൻ വിനിതയുടെ മുറിയിൽ കയറിയതും ടി വീട്ടിലെ ലൈററുകൾ എല്ലാം അണഞ്ഞു. " Then she heard a noise "എന്നെ കൊല്ല ുന്നേ. ആരാ എന്നെ പിടിക്ക ുന്നത്." The deceased was taken into the car by A1 and A2. PW9 daughter also accompanied. A1 and PW9 came back in an autorickshaw. Took a bottle of water and a bag

with them. PW5 corroborated the evidence of PW2. PW10 who is the son of PW2 has given an evidence that there was a sound എന്നെ കൊല്ലുന്നേ. All these evidence prove that deceased was killed on the basis of criminal conspiracy.

(16) Recovery of dead body at the place shown by A1 which is admissible under Section 27 of the Evidence Act also corroborates the prosecution case.

All these circumstances clearly prove that accused are guilty and nobody other than accused are guilty.

20. It was argued for the accused that even if evidence of witnesses like PW2 is believed, none of the witnesses stated that A1 and A2 were seen in the locality of deceased after 15.4.2000 and he died only much later as per prosecution story and last seen together theory cannot be applied in view of time gap. But, nobody has seen deceased after A1 and A2 took away him in the ambassador car at about 9.30 p.m. A2 being the wife was bound to explain what happened to her husband who was taken forcibly for treatment to the hospital. It is argued that there is no evidence that phenobarbitone was administered in excess quantity and what was the quantity of the

phenobarbitone administered by them. A1 was a Military hospital nurse. PW32 from whom phenobarbitone was alleged to be purchased deposed that he has no licence to sell the same, but, later he admitted that he is selling phenobarbitone tablets like Gardinal. Phenobarbitone tablets and its powder in paper packet were found from the house where deceased breathed his last (Ext.P9). Therefore, we are unable to accept the contention that there is no evidence to show that phenobarbitone tablets were available to the accused. Postmortem report and chemical analysis report prove that deceased died by consuming phenobarbitone. All the four circumstances pointed out in **Sarath Birdhichand Sarda** v. **State of Maharashtra** ((1984) 4 SCC 116) are proved in this case.

(1) That there is a clear motive in accused to administer poison to the deceased.
(2) that the deceased died of poison (phenobarbitone).
(3) that the accused had poison in his possession and it was found in the house of A1 at Kumarapurajm.
(4) He had an opportunity to administer the poison on the deceased.

There is evidence (PWs 7 and 36) to show that A1 took a room at Attingal in the name of Vinod and A1 and A2 stayed there and A2 later telephoned somebody calling one Vinod.

22. We have discussed the evidence adduced in this case in detail. Even if some of the circumstances relied on by the

prosecution were not proved, the circumstances proved by admissible evidence completes the chain pointing out the guilt on the accused and the only hypothesis possible from the evidence adduced is that A1 and A2 together committed the murder in furtherance of their common intention and common plan and, therefore, after analysing the entire evidence, we are of the opinion that A1 and A2 are guilty of offence punishable under Section 302 read with Section 34 of the Indian Penal Code as well as other offences found by the trial court. With regard to the death sentence reference, we are of the opinion that even though the murder was brutal, every brutal murder cannot be termed as rarest of rare cases.

23. It was pointed out by the defence that even if the prosecution case is believed, A2 married one Raju who was employed abroad and deceased who was the friend of Raju finally started living with A2. The murder in case of illicit relationship though not justifiable cannot be treated as rarest of rare cases. Considering the facts of this case and mitigating and aggravating circumstances pointed out in **Bachan Singh** v. **State of Punjab** ((1980) 2 SCC 684) and **Machhi Singh and others** v. **State of Punjab** ((1983) 3 SCC 470), we are of the opinion that it is not a rarest of rare cases. Therefore, death sentence is set aside and instead of death sentence,

the lesser punishment of life imprisonment is imposed on A1 and A2 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Conviction and sentence under sections 120B, 201 and 364 IPC are also confirmed. However, in case sentence is commuted, accused can undergo the sentences concurrently.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

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